

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL  
DISTRICT.

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OAH Case No. 2015010344

**DECISION**

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on January 9, 2015, naming Oakland Unified School District. The matter was continued for good cause on February 27, 2015.

Administrative Law Judge Theresa Ravandi heard this matter in Oakland, California, on April 14, and 15, 2015.

Karen Watkins, Attorney at Law, appeared on behalf of Student.<sup>1</sup> Parent attended each day of hearing. Student was not present during the hearing.

David Mishook, Attorney at Law, appeared on behalf of Oakland. John Rusk, Oakland's Compliance Coordinator, attended both days of hearing.

On April 15, 2015, the matter was continued and the record closed on May 13, 2015, upon receipt of written closing briefs from the parties.

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<sup>1</sup> Attorney Jean Adams attended part of the first day of hearing.

## ISSUES<sup>2</sup>

1. Beginning January 9, 2013, did Oakland deny Student a free appropriate public education during the 2012-2013 school year by:
  - a. failing to offer an appropriate educational program and related services designed to address her needs in the areas of reading, spelling, writing, and math; and
  - b. failing to protect Student from bullying and failing to provide her with a safe learning environment?
2. Did Oakland procedurally deny Student a FAPE by failing to include her special education teacher at the November 18, 2013 individualized education program team meeting?
3. Did Oakland deny Student a FAPE during the 2013-2014 school year by:
  - a. failing to offer an appropriate educational program and related services designed to address her needs in the areas of reading, spelling, writing, and math; and
  - b. failing to protect Student from bullying and failing to provide her with a safe learning environment?
4. Did Oakland deny Student a FAPE during the 2014-2015 school year by failing to assess her in all suspected areas of disability as follows:
  - a. failing to conduct a social-emotional assessment following an alleged peer sexual assault which occurred in September 2014;
  - b. failing to conduct a mental health assessment following an alleged peer sexual assault in September 2014; and
  - c. failing to complete a full psycho-educational assessment with cognitive, perceptual, and social-emotional testing?

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<sup>2</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

5. Did Oakland procedurally deny Student a FAPE during the 2014-2015 school year by:

- a. moving Student in October 2014 to another school without providing prior written notice, without obtaining Parent's consent, and without allowing Parent meaningful participation in an IEP team meeting to discuss a change in placement;
- b. failing to provide prior written notice of its refusal to provide Student with transportation to Roosevelt Middle School; and
- c. failing to provide prior written notice of its refusal to provide counseling services to Student following an alleged peer sexual assault in September 2014?

6. Did Oakland deny Student a FAPE during the 2014-2015 school year by:

- a. failing to offer an appropriate educational program and related services designed to address her needs in the areas of reading, spelling, writing, and math; and
- b. failing to protect Student from bullying and sexual assault, and failing to provide her with a safe learning environment?

### SUMMARY OF DECISION

This case is about a young female student who was subjected to bullying and sexual harassment while at school. Despite these hardships, Oakland's IEP's provided Student an educational benefit and she progressed academically. Even so, Oakland had reason to suspect that the bullying and harassment might have adversely impacted Student's social, emotional, and mental health and had a duty to assess in these areas. Oakland was also required to assess Student's intellectual development pursuant to a signed assessment plan. This Decision finds that Oakland's failure to assess Student's cognitive, social, emotional, and mental functioning denied Parent meaningful participation in the development of Student's educational program and awards Student independent psycho-educational and mental health evaluations at Oakland's expense. Student did not prove her other procedural claims. Under the circumstances of this case, her transfer to a new school did not constitute a change in educational placement.

## FACTUAL FINDINGS

1. Student is 14 years old as of June 4, 2015. At all relevant times she resided with Parent within Oakland's boundaries. In June of 2008, Oakland found Student eligible for special education under the category of specific learning disability due to auditory and visual processing disorders. As of the time of hearing, Student remained eligible pursuant to this category.

2. Student attended Frick Middle School for sixth and seventh grade, the 2012-2013, and 2013-2014 school years. She last attended Frick at the start of her eighth grade year in September 2014, and then transferred to Roosevelt Middle School in October 2014. At the time of hearing, Student was an eighth grader at Roosevelt. From the 2012-2013 school year through the time of hearing, Student received specialized academic instruction in a special day class setting for all of her core classes, and participated in general education classes for one elective and physical education.

### *Sixth Grade, the 2012-2013 School Year*

3. In January 2013, the start of the statutory time frame, Student's operative IEP was dated November 27, 2012. At the annual IEP team meeting in November 2012, the team identified Student's present levels of performance and areas of need. Her communication development, and motor, vocational, and daily living skills were appropriate. Academically, Student had mastered addition, subtraction, and rounding of decimals, and was able to complete long division and multiplication with a multiplication table at 75 percent accuracy. She read at a second grade instructional level with comprehension slightly lower.<sup>3</sup> Determining instructional and independent reading levels is subjective and reading levels are based upon varying percentile ranges of accuracy, comprehension, and, at times, "frustration."<sup>4</sup> Student comprehended grade level text that was read to her. She spelled at a third grade level and was able to write complex sentences and simple paragraphs.

4. Student's behavior did not impede learning of self or others during the 2012-2013 school year. Student's behavior support plan from September 2010, was attached in error to the November 2012 and November 2013 IEP's. This behavior plan addressed Student's behaviors of yelling at students and teacher, fighting, and leaving class. There was no testimony that Student engaged in these behaviors during the statutory time frame.

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<sup>3</sup> An instructional level is the level at which a student can access the material with supports from the teacher, generally with 75 percent accuracy and 90 percent comprehension. An independent reading level is the level at which a student can individually read and comprehend, generally with 95 percent accuracy.

<sup>4</sup> A frustration reading level reflects that level at which a student is able to read and comprehend to some extent, but the material is outside her comfort and confidence level.

Student's discipline record notes one physical altercation in the 2013-2014 school year, and one verbal and one physical altercation resulting in suspension in September of 2014. Student's only identified area of need was academics, specifically math, reading, and writing.

5. The November 2012 IEP team developed a goal to address each of Student's academic needs. Each goal was based on the sixth grade curriculum and built on Student's then-current baseline. Student's math goal called for her to determine when and how to break down math problems with single and multi-step solutions with 80 percent accuracy. Student's reading goal required her to identify and use the structural features of a media item to obtain information with 80 percent accuracy. Her writing goal called for her to write a three paragraph expository essay with an emerging topic sentence, four to six supporting sentences, and a summary conclusion using appropriate grade level language and conventions with a score of at least 8 on a 10-point rubric.

6. The November 2012 IEP team considered a continuum of program options including resource specialist program, special day class, and home and hospital instruction. Because Student's processing difficulties impeded her ability to access the general education curriculum, she needed the intensive instruction and modified curriculum provided in a special day class setting for all core classes. In addition, Student required the structure and supervision of a special day class due to her social, emotional, or behavioral needs concurrent with her learning needs. Student received the following academic accommodations: on task reminders, verbal encouragement, questions read aloud, audio presentation in math, and extended time for tests with supervised breaks. Student was a hard worker, had good attentional skills, and made measurable academic gains.

#### ACADEMIC PROGRESS

7. During her 2012-2013 sixth-grade school year, Student attended a combined sixth through eighth grade special day class, which was co-taught by Lindsey Maples and Nicholas Wright.<sup>5</sup> The class of approximately 31 students was divided into a sixth/seventh grade section and a seventh/eighth grade section, based upon class level and social functioning needs. Student was in the sixth/seventh grade section for the 2012-2013 school year. Each section had a class aide. Ms. Maples taught all the students English and history, and Mr. Wright taught math and science. Both teachers closely collaborated and shared information about Student's progress, participation, and social-emotional functioning.

8. Student gained confidence in her math abilities over her sixth grade year. During the 2012-2013 school year, Oakland switched from the Voyager math curriculum, which focused on rote memorization and practice skills, to the Common Core curriculum with a focus on complex, multi-step math word problems, and an emphasis on group strategizing. Mr. Wright modified the curriculum to meet Student's needs and developed new assessment practices which captured her willingness to attempt word problems, as well

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<sup>5</sup> Mr. Wright testified at the hearing. In 2012, he obtained a clear credential as an education specialist and has been a special education teacher with Oakland since July 2010.

as her skill level. Student's rate of "purposeful trying" increased as she developed her skills. Student mastered the skills to successfully complete her math work and gained the confidence to lead her math class in group projects.

9. Student was also a leader in her English language arts classes. In terms of reading progress, as of November 2012, Student read independently at a grade level of 1.5, and read at a second grade instructional level. Four months later, by March of 2013, Student was able to independently read at a 2.3 grade level with 75 percent accuracy, and at a 3.2 grade reading level, with 45 percent frustration. Student's reading skills improved during sixth grade.

10. Parent received a progress report every three weeks and a report card every six weeks. Student earned grades of A's, B's, and C's. Parent did not report any concerns about Student's academic progress to her teachers. Student progressed academically during her sixth grade year and made gains on all her goals as determined at her annual IEP team meeting in November 2013, discussed below. Student benefited from a special day class with its small class size, specialized instruction, and supports as demonstrated by her academic gains. Although Parent testified that Student needed to learn more and was not making enough progress, Student did not refute evidence of her academic progress.

#### BULLYING

11. In transferring from an elementary resource specialist program to a middle school special day class, Student struggled with her self-esteem, and demonstrated some anxiety at the start of sixth grade. Even so, her emotional state was typical for a student in middle school, and she was able to make friends.

12. A few peers made fun of Student because she had a distinct odor. Mr. Wright, Ms. Maples, and the class instructional aide spoke to Parent about their concern that this odor may indicate a health issue. They referred Student to the school health center where she met with a school nurse. Prior to the November 27, 2012 IEP team meeting, Student's classroom staff wrote Parent a letter expressing their concern that Student's symptom might result from a sexually transmitted disease. They encouraged Parent to discuss the letter with Student's treating doctor. Sometime thereafter, Parent took Student to Children's Hospital of Oakland. Parent did not agree that Student had an odor or health issue.

13. At the start of the school year, Oakland had the student body watch the movie "The Bully Project" in order to raise awareness about bullying and provide education. Oakland informed students it would not tolerate acts of bullying and would discipline those who bullied. Oakland posted bulletins informing parents of their right to file an incident report with the school or a police report to combat acts of bullying. A few of Student's classmates regularly teased her and called her names throughout sixth grade because of her weight and body odor. The teasing occurred mostly during her P.E. class and in the

hallways. Jeffrey Taylor was the vice principal of Frick during the 2012-2013 school year.<sup>6</sup> He recalled Student being teased on a near weekly basis that year and considered these incidents to be acts of bullying and harassment.

14. Mr. Taylor convened a group conference with Student and those who bullied her every time an incident was brought to his attention, which was almost weekly. The purpose of the meeting was to ensure that all understood that the acts of teasing and name calling constituted bullying, and that bullying was not acceptable. These conferences provided a forum for the bullies to apologize to Student. While initially upset and angry about being bullied, Student responded positively to the meetings and readily returned to class. Student did not establish how long the meetings lasted or whether she missed class time to attend the meetings. Student was also invited to participate in restorative justice circles facilitated by Oakland staff to confront the bullies and share the impact.

15. Oakland referred Student to the Coordination of Services Team (COST) for the provision of mental health services in response to the bullying. COST is a multi-disciplinary team which provides general education intervention by assessing the needs of students and identifying available resources to meet those needs. These services are available to all Oakland students. During sixth grade, Student participated in general education counseling services with Kara Schmidt through COST.

16. Parent testified that at times she picked Student up early from school due to bullying and sometimes allowed her to stay home the day following an incident to “cool down.” Also, Parent sometimes allowed Student to stay home on the first day of her menstrual cycle as Student was concerned that she could not adequately address her hygiene and this would subject her to more bullying. Parent’s testimony lacked detail, and she did not establish how often she picked Student up from school due to bullying or how often she allowed her to stay home to avoid further bullying or to recoup from a prior incident. Further, Student had struggled with regular class attendance for many years, even when there were no reports of bullying.

17. Student missed several weeks of class her sixth grade year. Mr. Wright did not recall her absences corresponding to incidents of bullying. Student had struggled with school attendance dating back to March 2009, when Oakland held a School Attendance Review Team meeting to discuss her absences. In the 2010-2011 school year, her fourth grade year, Student had 34 absences and another conference on truancy. Truancy letters were next sent home on November 20, 2012, and the following year on December 6, 2013. Student’s absences continued into the 2014-2015 school year at Roosevelt, where she missed 13 full days of instruction due to unverified absences, as well as 2 days due to illness from

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<sup>6</sup> This is Mr. Taylor’s 17th year with Oakland and his second year as principal of Frick. Prior to being an administrator, he was a teacher. He holds clear administrative and multiple subject teaching credentials.

October 1, 2014, through March 2015. Overall, Student missed three to four instructional weeks for individual class periods at Roosevelt her first six months of attendance, even though there were no reports of bullying.

18. Student became angry when teased. However, Student continued to access and benefit from her educational program. Student previously would yell, fight, and leave class when faced with stressful social situations or challenges, or when she felt she was being made fun of, which led to the development of a behavior plan. There was no evidence of any such behaviors during the 2012-2013 school year. She did not exhibit any maladaptive behaviors or emotional outbursts. There was no evidence that Student shut down, withdrew, or was otherwise unable to benefit from her educational program due to bullying.

#### *Seventh Grade, the 2013-2014 School Year*

##### NOVEMBER 18, 2013 IEP TEAM MEETING

19. Student's IEP team met for her annual review on November 18, 2013. Parent did not attend this meeting despite Oakland's attempts to involve her in scheduling the meeting and despite receiving a notice of meeting the week prior.<sup>7</sup> Parent missed many of Student's IEP team meetings due to her work, and she did not object to Oakland conducting this meeting without her. Parent relied on Oakland to identify and address Student's educational needs. Student's special education teacher Mr. Wright, her general education P.E. teacher, and the vice principal who served as the administrative designee attended the November 2013 IEP team meeting. Mr. Wright was chairperson and note-taker, as well as the special education specialist at this IEP team meeting. Student contended, but did not establish, that this IEP meeting was not properly constituted because her special education teacher did not attend.

20. Oakland reviewed Student's present levels of performance, identified her areas of need, reviewed progress on her goals, and developed new goals. Student regularly helped her peers, was very social, and enjoyed talking with friends. There were no concerns regarding Student's communication development, or her motor, vocational, or adaptive skills. In terms of social-emotional functioning, by November 2013 Student demonstrated greater skills in handling her emotions, although she sometimes struggled when others picked on her.

21. In math, Student continued to use a multiplication table to work on division and some multiplication problems. She regularly led her group in working through word problems and providing feedback. She was also a leader in her reading class. Student read at a fourth grade instructional level and demonstrated consistently high levels of fluency. Comprehension was an area of focus, with Student able to comprehend consistently at a

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<sup>7</sup> Whether Oakland denied Parent meaningful participation in the decision making process when it convened this IEP team meeting without her was not at issue in this hearing and no findings are made in this regard.

second grade level. With graphic organizers, she could write a paragraph using proper grammar but struggled with formal organization. She remained at a third grade level in spelling. Student met her prior math and reading goals. Although she did not meet her writing goal, she made progress, particularly with generating topic sentences. Student's areas of need remained writing, reading, and math.

22. Student's math baseline of being able to add, subtract, and multiply decimals with a multiplication table appeared lower than her 2012 baseline which included division. However, the curriculum had shifted from rote practice skills to solving complex word problems, which resulted in less time practicing division. Student's new math goal was based on a modified seventh grade curriculum which demonstrated academic growth. Her seventh grade math goal called for Student to calculate the correct response when given assorted addition, subtraction, multiplication, and division of rational numbers at her instructional level, with 80 percent accuracy. Her new reading goal required her to determine the type of material that information was derived from, based upon structure and purpose with 80 percent accuracy. Student's new writing goal called for her to write an essay with an introduction, body, and conclusion, each with a topic sentence and supporting sentences, with a score of at least 8 on a 10-point rubric.

23. Student continued to require a special day class for all core classes due to auditory and visual processing difficulties and her need for intensive instruction and modified curriculum. Student's prior academic accommodations continued. Although neither party introduced a signature page showing Parent consented to this IEP, Parent's testimony established that when she did not attend an IEP team meeting, Oakland sent her a copy of the IEP, and it was her practice to then sign the consent page. Oakland implemented this IEP. Student remained in the combined special day class at Frick, but she initially moved into the seventh/eighth grade section.

#### ACADEMIC PROGRESS

24. By seventh grade, Student was at the top of her math class. Mr. Wright relied on her to guide the class during group projects. Student made steady academic gains in those skills emphasized by the Common Core curriculum, particularly in her approach to complex math word problems. Her teachers recognized her as a class leader who regularly assisted her classmates. Student progressed academically in all areas.

25. Student earned all A's and B's throughout seventh grade. Her math grade was based on class assignments, group work, and homework. Student frequently earned or exceeded the total possible daily math points. She struggled to return her homework and received a zero or "no score" for 12 separate weeks. Over the course of the year, Student received a "no score" for ten separate weeks in the category of math group work which occurred on Fridays. These missing scores meant that she was absent those Fridays and did not participate in the group assignment. Mr. Wright did not penalize Student for her many missed days as she completed good work when present.

26. Student's reading level regressed over the summer prior to her seventh grade year.<sup>8</sup> Summer regression occurs because students do not practice their emerging skills, lack the class structure, and are not exposed to new material and testing opportunities. The testimony of Mr. Wright and Molly Bloom, one of Student's special education teachers during the 2014-2015 school year, established that it is common for a student to lose half a grade level or more over the summer, and require a full six-week grading period to regain lost ground.<sup>9</sup> As of March of 2013, Student had been reading at a 2.3 instructional level.<sup>10</sup> However, she began seventh grade at only a second grade instructional reading level. Even so, by the time of her November 2013 IEP, Student's reading baseline improved to a fourth grade instructional level, with second grade level comprehension. Student started seventh grade with a third grade frustration reading level and ended the year at a fourth grade frustration level. She progressed from a second grade instructional level to a 3.5 instructional grade level by June 2014. Despite the apparent drop in instructional level from a fourth grade level as reported in her November 2013 IEP, to a 3.5 grade level in June of 2014, as recorded in teacher progress notes, Student's reading skills improved during seventh grade.

27. Other than Parent's testimony that she believed that Student needed to learn more, Student did not introduce any evidence refuting her academic gains throughout seventh grade. Student required the structure, supports, and modified curriculum provided in the special day class to continue her level of academic progress.

#### CONTINUED BULLYING

28. Although Student presented as social, positive, and a leader, she continued to struggle with self-esteem and a lack of confidence during the 2013-2014 school year. Student's November 2013 IEP no longer indicated she required a special day class setting due to social-emotional or behavioral needs. However, her teachers transferred her back to the sixth/seventh grade section of the class for social reasons and to protect her from teasing by the older students. Despite this protective measure, Student was the victim of bullying

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<sup>8</sup> Whether Student required extended school year services was not at issue in this hearing.

<sup>9</sup> At the time of hearing, Ms. Bloom anticipated receiving her masters of education in special education in May 2015. For the past two years she has taught a special day class for students with mild to moderate disabilities as authorized by her special education intern credential.

<sup>10</sup> The parties did not establish what Student's instructional reading level was at the end of sixth grade.

throughout her seventh grade year. One male classmate, in particular, bullied Student. Due to his disability, this student struggled to comply with the classroom behavior expectations. This student regularly called Student names, teasing her about how she smelled. A few other students occasionally joined in.

29. Student was bullied more frequently during the 2013-2014 school year because of the enrollment of this one particular classmate that year. Student was bullied in class approximately two to three times per month. The teachers instituted a policy that certain words related to the names Student had been called were banned from class, and the use of these words resulted in an automatic office referral. Despite efforts to suppress all bullying as soon as it started, Student was still bullied in class at least a couple times per month. Further, there were incidents of bullying outside of the class, on the school campus, which were referred directly to administration.

30. Oakland responded to the bullying as it did the previous year. If bullying occurred in the class, the instigators were sent out immediately. Principal Taylor conducted group conferences with the bullies and Student, and Student was invited to participate in restorative justice circles as needed. During her seventh grade year, there was no evidence that the bullying negatively affected Student's ability to access her educational program. The bullying did not affect her class performance, and Student did not display any emotional outbursts or maladaptive behaviors. Student did not participate in the COST counseling during seventh grade. Student failed to establish that the bullying had any negative impact on her mental health, social-emotional functioning, or academic progress.

31. Parent testified that during seventh grade, like the previous year, she sometimes picked Student up early because of bullying, and allowed her to stay home the next day, as well as on days when Student started her menstrual cycle out of fear that she would be teased. Further, Parent informed the attendance clerks when Student was absent due to bullying concerns. Oakland did not refute Parent's testimony that Student missed school due to bullying. However, Parent's testimony did not establish how often such bullying-related absences occurred or that the bullying prevented Student from receiving educational benefit. Mr. Wright persuasively testified that although Student missed approximately two weeks of school both her sixth and seventh grade years, she continued to make academic gains. Parent did not request counseling services or supports to address any possible social-emotional needs related to bullying during Student's seventh grade year, nor did Student exhibit a need for such supports.

#### *Eighth Grade, the 2014-2015 School Year*

##### SEXUAL INCIDENT

32. At the start of her eighth grade year, Student remained in the sixth/seventh grade section of the special day class at Frick. On or about September 16, 2014, Student was involved in a sexual incident with two male students in a back room of the special day class

during class time.<sup>11</sup> During hearing, a significant amount of time was spent addressing the details of this incident. However, given the discrepancy in documentary evidence and the fact that neither Student nor the involved male students, nor the interviewing police officer testified, the specific details of the incident cannot be determined nor are they required to determine the issues presented.<sup>12</sup> The ALJ was not able to fully read or understand Student's handwritten statement to Principal Taylor so no findings are based on that document. The Oakland Police Department's Incident Report purports to summarize Student's statements made during the investigatory school-parent meeting on September 23, 2014. However, it varied significantly from Oakland's contemporaneous notes of this meeting and the testimony of Mr. Taylor who attended the meeting, and therefore was afforded little weight.<sup>13</sup> Further, without the police officer's testimony as to the words he used to question Student about the sexual incident, and the words she used to describe the incident, it is unclear what occurred beyond what Student acknowledged during the meeting and in her statement to police, following the meeting.<sup>14</sup>

33. On or about September 18, 2014, an instructional assistant witnessed an argument between Student and the involved male students. School staff could not immediately determine the cause of the argument. On September 22, 2014, a substitute principal questioned all three students and learned there was an allegation of sexual activity in the classroom. Oakland terminated its questioning of the students and scheduled an investigatory student-parent meeting the next day on September 23, 2014. The two male students and their parents, Student and her adult sister, Mr. Taylor, the substitute principal, the instructional assistant, a note taker, and Oakland Police Officer Keith Souza attended. During this meeting, Student reported that the two males exposed themselves to her the week prior in class; they had done this since the start of the school year; and they told her they would spread rumors about her if she told anyone. Both boys reported that Student engaged in sexual activity with them in class.

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<sup>11</sup> Documentary evidence is unclear as to whether the incident occurred on September 16, or 18, 2014.

<sup>12</sup> The statements of the two male students are hearsay and can only support a factual finding to the extent they supplement or explain other evidence of the incident. (Cal. Code Regs., tit. 5, § 3082, subd. (b).) Neither party established the unavailability of these students so their statements are not admissible as declarations against interest. (Evid. Code, §§1230, 240 [grounds for finding a witness unavailable].)

<sup>13</sup> Oakland's "Notes of Parent Meeting" is a hearsay document. However, it supplements other evidence of the sexual incident, including Student's party admissions.

<sup>14</sup> Student's statements fall within the hearsay exception for party admissions. (Evid. Code, § 1220.)

34. After the meeting, Student gave a verbal statement to Officer Souza which he wrote down and Student signed. Student's recorded statement and her admissions during the school meeting as recorded by Oakland and testified to by Mr. Taylor, established that the two males exposed themselves to her, requested a sex act, and threatened to spread rumors if she refused. Student denied engaging in any sexual activity at school, and the evidence did not establish that Student engaged in sexual activity on campus.

#### *BULLYING, SEXUAL HARASSMENT, AND SAFE ENVIRONMENT*

35. Student's statements during the school meeting and her statement taken by Officer Souza further established that the two male students involved in the September 2014 sexual incident had previously exposed themselves to Student since the start of the school year. Student did not report this earlier because they threatened to spread rumors about her if she told. These male students thus subjected Student to further incidents of bullying during the 2014-2015 school year at Frick. Oakland was unaware of the sexual harassment until September 23, 2014. These acts of sexual harassment created an unsafe learning environment for Student. Once Oakland learned of these incidents, it took immediate steps to prevent further sexual harassment from occurring. Because of Oakland's preventative measures, discussed below, Student was still able to access her educational program and receive benefit. There was no evidence that classmates continued to bully Student by calling her names or teasing her about body odor during her eighth grade year.

36. In response to the sexual harassment, Oakland changed Student's classes to ensure that she would have no contact with the involved male students.<sup>15</sup> However, Student did not attend any classes at Frick following the September 23, 2014 meeting, because Oakland agreed to Parent's request to transfer Student to another school. Following disclosure of the sexual incident, Student displayed some emotional and behavioral difficulties at home. She would wake up in the middle of the night; she no longer wanted to interact with same-aged male relatives; and, in Parent's words, she exhibited less pride. Parent did not report any of this to Oakland, nor did Student share any concerns. Further, Student did not display any negative changes in her social-emotional, behavioral, or academic functioning at school as discussed in full below.

#### *Transfer to Roosevelt's Special Day Class*

37. After learning of the sexual incident, Parent asked Oakland to transfer Student to another school because of its failure to adequately supervise the special day class, protect Student from sexual harassment, and ensure a safe learning environment. Oakland agreed to a safety transfer to one of two schools: Roosevelt or Roots International Middle School. As of Friday, September 26, 2014, Student was no longer enrolled at Frick.

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<sup>15</sup> The appropriateness of changing Student's classes as opposed to transferring the male students, and whether this change in classes constituted a change in placement were not at issue in this hearing.

38. Although Parent preferred a transfer to Roots as it was closer to home, Roosevelt had an immediate opening. Sometime after the meeting on September 23, 2014, and September 26, 2014, Mr. Taylor verbally informed Parent that Oakland had transferred Student to a new school, per Parent request. Parent also received a letter from Mr. Taylor on September 26, 2014, informing her of the transfer to Roosevelt. Parent had requested the transfer, was expecting this transfer letter, and brought it with her to Roosevelt on Student's first day. The evidence established that Parent and Oakland agreed to this change in school. Parent later formalized her consent by signing the November 2014 IEP which identified Roosevelt as Student's school of attendance. As of October 1, 2014, Student was enrolled at and attending Roosevelt.

39. Student was not bullied at Roosevelt. Further, Student did not introduce any evidence that past incidents of bullying adversely impacted her education or prevented her benefiting from her program. Student continued to progress academically as discussed below. She displayed typical interactions with boys at Roosevelt. For instance, she would sit next to them, and offer to help. There was no evidence that Student exhibited any social-emotional concerns or maladaptive behaviors during her time at Roosevelt. However, Student's poor attendance pattern continued. Although Student did not prove the bullying denied her a FAPE, the evidence established that Oakland had reason to suspect she may have social, emotional, or mental health needs warranting assessment based on what she experienced. This is addressed below.

#### COMPARABLE EDUCATIONAL PROGRAM AT ROOSEVELT

40. Ms. Bloom co-taught the special day class at Roosevelt with Shawdee Rouhafza. Ms. Bloom served as an AmeriCorps volunteer at Frick during the 2012-2013 school year and was familiar with Mr. Wright's special day class. Her testimony established that the mild to moderate special day class at Roosevelt was comparable in all main respects to the special day class Student attended at Frick. Student did not contend otherwise. At Roosevelt, she attended all of her core classes in the special day class setting and participated in one elective and a P.E. class in the general education setting just as she did at Frick.<sup>16</sup> Roosevelt's special day class was also split into two sections based upon student abilities and needs, and two teachers each taught two subjects, using the Common Core curriculum,

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<sup>16</sup> Although Student's 2013 IEP indicated that she spent 34 percent of the time outside the regular education environment at Frick, and 66 percent of the time in regular education, it is clear these time percentages were inadvertently switched. Student spent four periods a day, 55 minutes a period, in Frick's special day class. Pursuant to her 2014 IEP, Student spent 17 percent of the time in regular education at Roosevelt and 83 percent of the time outside the regular class calculated at a rate of five, 50-minute periods a day. Student did not establish that these percentages, or the addition of one special day class period, constituted a substantial and material difference between the two programs.

modified to meet Student's needs. Ms. Bloom taught science and English, and Ms. Rouhafza taught history and math. The teachers closely collaborated regarding Student's progress on goals, participation, and social-emotional functioning. Student did not establish that this change in schools constituted a change in her educational program.

#### PARENT REQUEST FOR TRANSPORTATION

41. At the time of the transfer, Parent informed Mr. Taylor that Student required transportation to Roosevelt as it was farther from the family home. Parent established that it took approximately 25 minutes to drive Student to Roosevelt, whereas it used to take approximately 7 minutes to drive to Frick. Oakland did not contend otherwise. Mr. Taylor assured Parent that Oakland would provide transportation to Roosevelt. Parent had always transported Student to school, and her IEP's from 2011 through 2014, never offered transportation as a related service. Parent consented to Student's November 2014 IEP which did not offer transportation services.

42. On September 26, 2014, Parent received a letter from Oakland instructing her to call a specified number to arrange Student's bus transportation. On October 1, 2014, Student's first day at Roosevelt, Oakland transportation staff informed Parent that Student was not eligible for transportation, and that special education staff would call Parent to discuss Student's eligibility. Oakland did not respond to Parent verbally or in writing regarding her request for transportation services. Parent made her own arrangements to take Student to and from Roosevelt. Oakland did not send Parent a notice or letter explaining why Student was not eligible for transportation, and it did not convene an IEP team meeting to discuss her request for transportation.

43. There was no evidence regarding Student's ability or inability to take public transportation. The record is silent as to transportation options available to Student and her ability or inability to access these. There was no evidence that her disability resulted in a need for transportation in order for her to receive educational benefit. Student did not establish that she required transportation as an IEP related service.

#### PARENT REQUEST FOR COUNSELING SERVICES

44. Following Student's sexual harassment at Frick, Parent requested that Oakland provide counseling services for Student. Parent could not recall who she spoke to in this regard. School staff told Parent they would try to arrange counseling and that someone would return her call. Oakland never responded verbally or in writing to Parent's request for counseling services, and did not convene an IEP team meet to discuss Parent's request and Student's need for counseling as a related service.

45. When Student transitioned to Roosevelt, Ms. Bloom made a new COST referral for Student to again participate in general education counseling with Ms. Schmidt. Ms. Schmidt returned from maternity leave in January 2015, and sometime after her return

and prior to the start of hearing, Student began counseling at Roosevelt. Parent learned of this counseling from Student.

46. Student failed to introduce any evidence of the impact of bullying, including the sexual harassment, on her mental health. Student did not introduce any evidence that she needed counseling as a related service in order to benefit from her educational program. Here, Student quickly adjusted to her new school, developed friendships, was attentive and participatory, performed well academically, completed her homework, and did not exhibit any maladaptive behaviors or social-emotional dysfunction. Her COST counselor did not report in sixth grade or in the course of her more recent involvement with Student in 2015, that Student required counseling services in order to access her educational program. Student did not introduce the testimony of any witness, expert or lay, that she required counseling services in order to receive educational benefit. While Student did not meet the higher standard of establishing she had social, emotional, or mental health needs, she did meet the lower threshold of establishing that Oakland had reason to suspect she may have such needs based on what she had experienced. Oakland's duty to assess is addressed below.

#### *November 2014 Triennial Assessment Process*

47. In October 2014, Oakland provided Parent an undated assessment plan calling for the special education teacher to assess Student in the areas of academic achievement and motor development; for the nurse to assess Student's health; and for the school psychologist to assess her intellectual development.<sup>17</sup> Tests evaluating the area of intellectual development measure how well a student thinks, remembers, and solves problems. Parent signed consent to these assessments on October 13, 2014. This triggered a legal timeline for Oakland to complete the agreed-upon assessments and convene an IEP team meeting within 60 days of receiving Parent's written consent. Ms. Bloom administered academic tests to Student on November 4, 6, and 14, 2014, and reported the results in her educational evaluation report which is discussed in detail below.

48. The school nurse interviewed Student and reviewed the health inventory completed by a family member.<sup>18</sup> The nurse attempted to reach Parent as part of her health assessment, but Parent did not respond. According to the inventory, Student had no health or vision issues, and was not prescribed glasses or contact lenses. On October 31, 2014, Student passed her hearing screening but failed her near vision screening without glasses. Student reported she was supposed to wear glasses daily, but only wore them for reading and watching television. On November 6, 2014, Student passed her far vision screening while

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<sup>17</sup> Student did not contest the adequacy of the motor development assessment, which would normally be conducted by an occupational therapist, nor did she contend that this was an area of suspected disability.

<sup>18</sup> The health inventory listed Parent as the person completing and signing the form on October 13, 2014, but Parent's adult daughter completed this form without Parent input.

wearing prescribed contact lenses, but again failed her near vision screen. At hearing, Parent acknowledged that Student broke her glasses over a year ago, and she had not replaced them. Student's health inventory indicated no difficulties with attention, behavior, memory, or "other." The final item, which asked for an explanation of "any other factor or concern you feel has affected your child's progress at school or is important for the nurse to know," was left blank.

#### OAKLAND'S DETERMINATION TO NOT CONDUCT PSYCHOLOGICAL TESTING

49. School psychologist Nicholas Dalebout testified that he was able to determine Student's cognitive, perceptual, and social-emotional functioning based on existing information.<sup>19</sup> This information included Student's previous triennial testing in 2011, and her initial eligibility testing in 2008, as well as his class observations, consultations with her teacher, and interviews with Student and Parent. Generally, a student's cognitive abilities and processing deficits do not change significantly over time. Here, Student's 2008 and 2011 testing showed that her cognitive abilities remained consistent, her processing disorder persisted, and her areas of academic need remained. Based upon his review of existing information, Mr. Dalebout did not see a need for additional psychological testing.

#### *THE TRIENNIAL RE-EVALUATION DETERMINATION FORM*

50. Mr. Dalebout did not appear to be familiar with Oakland's "Triennial Re-evaluation Determination" form when shown a copy at hearing. He did not complete this form. Although Mr. Dalebout believed that Ms. Bloom completed this form, explained it to Parent, and sent it home for signature, there was no evidence that this occurred. It was his recollection that Ms. Bloom informed him that Parent waived testing.

51. Parent signed the triennial re-evaluation determination form on October 13, 2014, and checked the box "yes" indicating that she was exercising her right to request an assessment. The form states in bold, "Based upon a review of the information referenced above, the [local education agency], in collaboration with parent, has determined that additional assessment is needed" with the option to then check yes or no. Neither box was checked, and the "date of determination" was left blank. The form indicated that the following information was reviewed: existing assessment data, classroom-based assessments, teacher observations, and Parent input. The form also indicated that if additional assessment was needed, testing should be completed only in the areas of academic achievement, motor development, and health. Oakland contended that the form reflected an agreement that psychological testing was not required because there were no check marks indicating a need to assess in the areas of cognitive functioning, social-emotional wellbeing, or adaptive/behavior needs. This document was at odds with the assessment plan sent home at the same time, because the box for cognitive testing was not checked. Oakland left the explanation section blank as to why no further assessment data was needed.

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<sup>19</sup> Mr. Dalebout has been an Oakland school psychologist since 2013. He earned his master's degree in school psychology in 2012, and holds a pupil personnel credential.

52. Mr. Dalebout did not inform Parent that it was his opinion that additional testing was not required, let alone explain the basis for his opinion, or her right to request additional testing despite his opinion. Mr. Dalebout did not talk with Parent about formal psychological testing. He testified it was Ms. Bloom's job to review the triennial reevaluation determination form with Parent. However, Mr. Rusk, Oakland's compliance coordinator, credibly established that it was the role of the school psychologist to explain the purpose and use of psychological testing.

53. Oakland did not explain the benefits of testing to Parent or the reasons why testing was not needed. Oakland did not involve Parent in the determination of whether additional testing was required. Further, there was no evidence that Oakland provided Parent with a copy of her procedural safeguards at the time it provided her the triennial assessment plan and triennial reevaluation determination form. In signing a form that did not specify that additional assessment was not needed, Parent did not waive psychological testing. Further, Parent's signature on the re-evaluation determination form which calls for assessment in the areas of academics, health, and motor development, did not void her consent to the assessment plan signed on the same date which additionally required the school psychologist to assess Student's intellectual development.

#### PSYCHOLOGICAL RE-EVALUATION REPORT

54. Mr. Dalebout completed a psychological re-evaluation report dated November 12, 2014, based on his records review, interviews of Ms. Bloom, Parent, and Student, and class observation. The purpose of his re-evaluation was to determine whether Student continued to qualify for special education and to assist in program planning.

55. Ms. Bloom reported that Student had transitioned well and fit in with her peers. Student was well-mannered, hard-working, articulate, and a helper. She was attentive in class, participated regularly, followed the rules, enjoyed expressing her feelings, and was an effective self-starter who preferred to work independently but was willing to work with others. Mr. Dalebout observed Student to be on task in class and respond appropriately. Parent expressed no concerns and believed Student had transitioned well. Student was open and friendly with Mr. Dalebout and expressed a positive view of school. She shared that she liked her current school better than Frick and did not report any concerns or need for supports.

56. The prior 2011 psychological testing revealed that Student's cognitive skills fell from far below average to below average. Mr. Dalebout did not conduct any testing in the area of cognitive functioning pursuant to the October 13, 2014 assessment plan. Regardless of Mr. Dalebout's opinion that intellectual development testing was not necessary to determine Student's continued eligibility or programming needs, Oakland was required to complete this testing in accord with its assessment plan. This failure to assess Student's intellectual development deprived the IEP team, including Parent, of full assessment data.

57. Mr. Dalebout also determined there was no need for a social-emotional or mental health assessment. This determination was not persuasive given the limited information he had about Student's recent past. Mr. Dalebout did not know why Student transferred at the start of her eighth grade year from Frick to Roosevelt; he did not know about the sexual incident at Frick or bullying in the form of sexual harassment; he did not know that Student was repeatedly bullied over two academic years at Frick; and he did not know that Parent had requested counseling services for Student in the fall of 2014, following the sexual harassment. Oakland is attributed with this knowledge. These circumstances were sufficient to put Oakland on notice that Student may have additional needs such that it had a duty to assess. The evidence did not support Oakland's determination that Student's social-emotional functioning and mental health were not areas of suspected need.

58. Student's educational records identified concerns with her social-emotional functioning. During the 2011-2012 school year, Student was subjected to bullying and many students avoided her. Student completed an emotional quotient inventory as part of her November 2011 triennial psycho-educational evaluation. Her responses demonstrated an inadequate capacity for understanding and relating to others, controlling her emotions, and solving problems. Student's overall emotional quotient score revealed an inadequate capacity for emotional and social functioning in general, including coping with daily demands and pressures. The evaluator determined that Student needed support with her coping and problem solving skills. At the time of the November 2012 IEP, Student struggled with self-esteem issues and required a special day class setting due to her social-emotional and/or behavioral needs. Although Student's ability to handle her emotions improved by November 2013, she still struggled when peers picked on her.

59. During the statutory time frame, Student did not outwardly present with social-emotional needs, mental health concerns, or maladaptive behaviors, and when interviewed, neither Parent nor Student reported any such concerns. Student did, however, present with inter-personal struggles, manifested by relentless bullying. By the fall of 2014, a social-emotional assessment and a mental health assessment were warranted because of the regular bullying Student experienced at Frick, in light of her identified reduced capacity for healthy social and emotional functioning. This bullying included deeply personal and hurtful teasing and name calling as well as bullying by two male students who sexually exposed themselves to Student in the classroom and threatened her. Oakland had sufficient reason to suspect that Student may have needs in the areas of mental health and social-emotional functioning due to being sexually harassed in the classroom and due to relentless bullying which persisted over two school years. Mr. Dalebout established that a disturbing event could trigger a mental health assessment. Sexual harassment in the classroom and pervasive bullying both qualify as disturbing events which reasonably could result in social, emotional, and mental health needs, even without an outward manifestation at school. Given all that Student experienced, Oakland had reason to suspect she may have social, emotional, and mental health needs. Therefore, Oakland was required to conduct a social-emotional assessment as well as a mental health assessment. Its failure to assess Student in these suspected areas of need deprived the IEP team, including Parent, of full assessment data, and therefore denied Parent her full participatory rights in the decision making process.

### *November 14, 2014 Triennial IEP Team Meeting*

60. On November 14, 2014, Oakland members of Student's IEP team met for her triennial review. Ms. Bloom attempted to involve Parent in scheduling this meeting prior to sending her the notice of meeting on October 20, 2014. Parent signed and returned the notice on October 27, 2014, checking the box requesting that the meeting be rescheduled, as well as the box indicating that the team could meet without her. After receiving this notice, Ms. Bloom attempted to re-schedule with Parent but was unable to reach her. Oakland convened Student's triennial IEP team meeting without Parent.<sup>20</sup>

61. The IEP team identified Student's present levels of performance and academic functioning. In terms of her social and emotional functioning, Student was positive, polite, and social. She was an effective communicator, was organized and timely completed her homework, was able to ask for help as needed, and demonstrated appropriate daily living and vocational skills. Despite bullying in the form of sexual harassment which occurred at the start of the 2014-2015 school year, and aside from typical middle school strife, Student did not present with any social, emotional, or mental health issues, or behavioral concerns.

### EDUCATIONAL EVALUATION

62. To obtain additional data on Student's academic abilities, Ms. Bloom administered the Woodcock Johnson III-Tests of Achievement and the Wide Range Achievement Test-Revision IV in November 2014. Student was not feeling well during two of the test days which affected her ability to sustain focus. For both standardized tests, the number of correct items is converted into a standard score based upon the student's age. A standard score from 85 to 115 is considered average. Aside from reading fluency, Ms. Bloom found the tests to be a valid reflection of Student's level of functioning. Student scored a 74 in reading fluency on the Woodcock Johnson. During this subtest she showed signs of test anxiety, took a longer time than usual with her reading, and did not appear to feel well. Student demonstrated higher reading fluency capabilities daily in class.

63. On the Woodcock Johnson reading subtests, Student tested below average, from her lowest score of 62 in letter word identification to a score of 84 in passage comprehension. Student also received below average reading scores on the Wide Range test. In spelling, Student scored a 64 on the Woodcock Johnson and a 79 on the Wide Range. She showed a relative strength on the Woodcock Johnson writing samples test, receiving an average standard score of 96 and was approaching average in writing fluency with a score of 84. Student received very low scores on the Woodcock Johnson math tests, including a standard score of 48 in calculation, a 64 in applied problems, and a 69 in math fluency. On the Wide Range she received a score of 71 in math computation, a subtest comparable to the Woodcock Johnson calculation subtest. Student demonstrated weaknesses in subtracting with regrouping and multi-step multiplication problems. She did not attempt to solve the

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<sup>20</sup> Student did not identify as an issue for hearing whether Oakland violated Parent's procedural rights by holding this triennial IEP team meeting without her.

division problems. At the start of each math subtest, Student expressed that she was not good at math and did not like math problems. During the math fluency subtest, Student used the strategies of self-talk and counting on her fingers. Student contended that counting on her fingers demonstrated regression. The evidence did not support this contention as Student used this same strategy during her 2011 testing.

64. Student did not perform well on standardized tests such as the Woodcock Johnson and Wide Range. This, in part, was explained by the curriculum shift which focused less on rote practice and test taking skills. Student's reduced self-confidence in her math skills also adversely affected her performance. The testimony of both Ms. Bloom and Mr. Wright persuasively established the importance of evaluating Student's abilities and progress based on class observations and work samples in combination with standardized testing. In her sixth and seventh grade math class, Student did not demonstrate difficulty solving addition and subtraction problems which were given context in a real-life word problem.<sup>21</sup> However, on the standardized math tests, Student confused addition signs and subtraction signs. Her visual processing disorder as well as the fact that she was not wearing her glasses accounts for these mistakes. Student demonstrated math computational skills in her written protocols which were not reflected in her scores. For instance, in comparing Student's math calculations on the two tests, it was clear that she demonstrated the ability to solve higher level math problems involving borrowing but at times skipped over easier problems.

65. A comparison of Student's standardized test scores from 2011, with her scores in 2014, demonstrated her academic progress. Because the tests are age-normed, a similar score three years later still showed academic progress since students gain new skills as they age. Student scored about the same on her Woodcock Johnson reading fluency test with a standard score of 75 in 2011, and a score of 74 in 2014, as well as on the math fluency test with a score of 67 in 2011, and a score of 69 in 2014. Student scored higher on 7 of 12 subtests. Of note, she made more progress than would be anticipated in passage comprehension, from a standard score of 60 in 2011, to a score of 84 in 2014. She also showed accelerated progress in writing fluency, advancing from a score of 73 to 84.

66. On three of the math subtests, Student's scores three years later were lower as was her letter word recognition reading score. Her most significant drop was in the Woodcock Johnson math calculations from a standard score of 75 in 2011, to a score of 48 in 2014. Despite Ms. Bloom's determination that Student's math scores were a valid reflection of her level of functioning, Mr. Wright, as Student's math teacher, was more persuasive in his testimony that Student could and did perform higher level math in the classroom. In addition, Ms. Bloom readily acknowledged that Student's cold symptoms and anxiety about not being good at math adversely impacted her score. Further, her math calculations score of 48 was at odds with her scores on the other math subtests which ranged from 64 to 71. Mr. Wright testified persuasively that the reason two different test instruments are used is to

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<sup>21</sup> For example, "Child X has \$43 and goes to the store to buy a toy that costs \$15.32. How much money will Child X have left if he buys the toy?"

compare and contrast, and to disregard outlying scores which may reflect a lack of effort rather than ability. A standard score of 48 is so statistically different from her other math scores, more than a full standard deviation of 15 points, that it is not a reliable indicator of her ability and did not provide credible support for Student's contention that she had regressed.

#### AREAS OF NEED, ACADEMIC PROGRESS, AND DEVELOPMENT OF NEW GOALS

67. The November 2014 IEP team reviewed Student's progress on her goals and developed new goals. By the end of her 2013-2014 school year, Student had met her math goal of answering assorted addition, subtraction, multiplication, and division problems of rational numbers with 80 percent accuracy. However, at the time of the annual review of this goal in November 2014, Student did not demonstrate mastery. Summer regression accounts for why she met the goal in June 2014, but was not able to perform at that level in November of 2014. Despite not meeting this goal at the time of her annual review, Student did make some progress, demonstrating a 60 percent level of accuracy. Student did not meet her reading goal but demonstrated progress to the extent she was able to categorize material based on the purpose, but not the structure, of the derived information. Student met her 2013 writing goal of demonstrating the ability to write a successful expository essay.

68. Academics, specifically reading, writing, and math, remained Student's area of need. The team developed new academic goals tracking the eighth grade curriculum, and three transition goals, one related to writing. Student's math goal continued to require her to solve assorted addition, subtraction, multiplication, and division problems with 80 percent accuracy. However, this goal increased in complexity as it modified her seventh grade goal to reflect eighth grade content. Student's comparison of her math baselines and goal reports over the academic years did not credibly establish regression or that she stopped progressing academically. For instance, Student compared her November 2013 math baseline of being able to add, subtract, and multiply decimals, to her December 5, 2014 goal progress report, which indicated she was unable to solve multiplication or division problems. However, in light of the curriculum shift and her documented progress in math class, Student's math abilities continued to improve. By the March 2015 goal report, Student demonstrated progress on her eighth grade math goal in that she was able to calculate the correct response for addition and subtraction at the required 80 percent accuracy level, and was able to solve multiplication problems with 70 percent accuracy.

69. According to the November 2014 IEP, Student was reading at a fourth grade level and consistently comprehending at a second grade level. Although this reading baseline remained the same from the prior year, the evidence established that Student typically read independently at a third grade level at the time of her academic testing in November 2014. Her new reading goal required her to cite the textual evidence that most strongly supported what a text explicitly and implicitly stated with 80 percent accuracy. Within one month she was able to determine the main idea of a text, and by March 2015, Student was approaching mastery and demonstrated her understanding of an inference and her ability to make appropriate inferences with support. As of the March 2015 goal report,

Student was reading at a fifth grade level with 70 percent comprehension, and comprehending early fourth grade level at 95 percent accuracy. Student's reading skills continued to improve over her eighth grade year.

70. In November 2014, Student was able to write coherent, descriptive sentences and appropriately organize a paragraph. While this baseline is similar to her 2013 writing baseline, her eighth grade writing goal now required her to utilize the strategies of planning, revising, and editing her writing with a focus on purpose and audience. By March 2015, Student was able to make corrections with support, and was able to address the correct audience and maintain purpose. As to her related transition goal of writing five paragraph narrative and descriptive essays, Student was able to write a three paragraph descriptive essay by March 2015, and continued to work on paragraph structure.

71. At her November 2014 IEP team meeting, Student continued to be eligible for special education as a student with a specific learning disability with weaknesses in auditory and visual processing which impaired her reading, writing, and math skills. Student required the smaller class size of a special day class as well as supports and additional time to process information and access content. The November 2014 IEP added additional academic accommodations such as shortened assignments, use of a calculator, and preferential seating. Parent consented to this IEP on November 19, 2014. She checked the box that she agreed to the IEP and also checked the box that she agreed with exceptions. However, Parent did not specify on the consent page any portion of the IEP with which she disagreed.

72. The evidence established that while Student could succeed in a general educational environment with supports, her progress would be slowed. Because of her processing deficits, Student was not able to access grade level content at the time of hearing.

73. Student continued to struggle with regular attendance during the 2014-2015 school year. By the time of Mr. Dalebout's re-evaluation report, Student had missed 4 full days of school without verification, missed 4 additional class periods, and was tardy to 4 other classes. These absences, in the context of her prior poor attendance record, further support Oakland's duty to look further to determine if Student had additional needs. Even though she was not subjected to additional bullying at Roosevelt, Student's poor attendance pattern continued. Overall, she had 14 full day unverified absences from October 2014 through March 2015, 2 additional days missed due to illness, and many more partial day absences. Student was tardy to her first period 8 times and missed various class periods from 16 to 21 times over this six month period.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework* <sup>22</sup>

1. This due process hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);<sup>23</sup> Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: 1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living; and 2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible student at no charge to the parent or guardian, meet state educational standards, and conform to the student’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the student to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in

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<sup>22</sup> Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

<sup>23</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents or local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (e).) At the hearing, the party filing the complaint, in this case Student, has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; See 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].)

#### *Educational Benefit*

5. “[T]he correct standard for measuring educational benefit under the IDEA is not merely whether the placement is ‘reasonably calculated to provide the child with educational benefits,’ but rather, whether the child makes progress toward the goals set forth in her IEP.” (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) Educational benefit is not measured solely by scores on standardized tests. (*Seattle School District No. 1 v. B.S.* (9<sup>th</sup> Cir 1996) 82 F.3d 1493, 1500 (*Seattle*), abrogated in part on other grounds by *Schaffer v. Weast*, *supra*, 546 U.S. 49, 56-58.) The term “unique educational needs” shall “be broadly construed to include the handicapped child’s academic, social, health, emotional, communicative, physical and vocational needs.” (*Ibid.*, citing H.R.Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

6. There is no one test for measuring the adequacy of educational benefit conferred under an IEP. (*Rowley*, *supra*, 458 U.S. at pp. 202.) A student may derive educational benefit under *Rowley* if some of her goals and objectives are not fully met, or if she makes no progress toward some of them, as long as she makes progress toward others. A student derives benefit when she improves in some areas even though she fails to improve in others. (See *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P.* (3rd Cir. 1995) 62 F.3d 520, at 530.) A student’s failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with her abilities. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 131; *E.S. v. Independent School District, No. 196* (8th Cir. 1998) 135 F.3d 566, 569.) However, a district may not discharge its duty under the IDEA by providing a program that “produces some minimal academic advancement no matter how trivial.” (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 890 (*Amanda J.*) citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.)

*Issues 1(a), 3(a), and 6(a): Student's Academic Needs and the Provision of FAPE*

7. Student contends that she failed to make academic gains over her sixth, seventh, and eighth grade years, and suffered regression due to Oakland's failure to provide an appropriate educational placement and academic services. Student points to her baselines and standardized test scores to support her contention.<sup>24</sup> Oakland contends that Student's goals, progress reports, class work, and testing all demonstrate sound academic progress.

8. Due to her specific learning disability and processing disorders that prevented her from accessing grade-level curriculum in a general education setting, Student required the small class size, individualized instruction, and modified curriculum provided in a special day class setting. Student's increased reading skills, progress on goals, and testing scores proved her academic gains across her sixth, seventh, and eighth grade years and demonstrated that she received educational benefit under the *Rowley* standard.

INCREASED READING ABILITY

9. Student's reading skills improved from an independent reading grade level of 1.5 and a second grade instructional level at the start of the 2012-2013 school year, to a 2.3 independent reading level and a 3.2 instructional grade level by March 2013. Due to summer regression, Student started seventh grade at a second grade instructional reading level. Even so, she progressed to a 3.5 instructional level by the end of the 2013-2014 school year. Even if Student's drop in reading level, from a fourth grade instructional level in November 2013, to a 3.5 instructional level in June 2014, showed regression, that Student failed to progress in one academic area over one semester, does not prove that she failed to receive educational benefit. Student made overall gains of more than one and a half grade levels in reading over the course of her seventh grade year. In November of 2014, Student was reading independently at the third grade level. By March of 2015, her independent reading level progressed to an early fourth grade level and she was able to read at a fifth grade instructional level with 70 percent comprehension.

PROGRESS ON ACADEMIC GOALS

10. To demonstrate educational benefit, Student was not required to meet all of her academic goals. Student did meet her sixth grade math and reading goals. Although she did not meet her essay writing goal, Student made measurable progress, particularly in drafting topic sentences. Despite remaining at a third grade spelling level in sixth and seventh grade, Student's sound academic gains demonstrated that she received more than de minimus educational benefit. Student met her seventh grade writing goal, demonstrating the ability to write an organized expository essay. By June of 2014, Student met her seventh grade math goal. However, in November 2014, the time of her annual goal report, Student

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<sup>24</sup> Student referenced the California Department of Education's eighth grade minimum standards in her closing brief. There was no evidence regarding these standards at hearing, so they were not considered.

did not demonstrate continued mastery due to summer regression. Even so, she made progress on her seventh grade math goal. Although Student did not meet her seventh grade reading goal, she made good progress and demonstrated the ability to identify the purpose, though not the structure, of reading material. Student continued to demonstrate progress on all her goals during the 2014-2015 school year. By March of 2015, she was approaching mastery of her reading and writing goals and partially met her math goal, demonstrating progress in multiplication. That Student did not make progress in division does not diminish the gains she did make nor prove she failed to receive educational benefit.

11. At first glance, a simple comparison of Student's reading, writing, and math baselines over the years showed Student's skills remained the same, and that she lost some math skills. Further, her math goals appeared to call for the same skills each year, namely to add, subtract, multiply, and divide. However, given the curriculum shift away from rote practice, and given that each annual math goal tracked modified, grade level curriculum standards, the development of her annual math goals reflected her progress. In addition, Student's confidence in her math skills grew, and she demonstrated significant skill acquisition in solving math word problems which was the focus of the new Common Core curriculum.

12. Student's comparison of her academic baselines and goal reports over the years did not demonstrate a failure to receive educational benefit, in light of her progress on increasingly difficult, and more sophisticated goals. For example, while Student's 2012, 2013, and 2014 writing baselines reflected her ability to write and organize a basic paragraph, her annual goals built on this foundation and reflected her progress. Student's writing skills progressed from focusing on organization to the more advanced skills of addressing audience and purpose, and using self-editing strategies. In reading, Student advanced from identifying and using the structural features of a media item, to categorizing reading material based on structure and purpose, to text analysis based on implicit and explicit references. Student's academic skill sets improved over the statutory time frame.

#### STANDARDIZED ACADEMIC SCORES

13. Standardized test scores alone are not an accurate reflection of Student's academic abilities. Student's below average and far below average academic test scores did not prove she failed to receive educational benefit. Her scores reflected her specific learning disability, her lack of confidence and practice with test taking given the curriculum shift, and her visual processing disorder combined with her failure to wear her prescribed glasses. For example, on standardized math tests, Student visually confused addition signs with subtraction signs, did not attempt any division problems, and skipped basic problems even while showing her ability to solve more complex problems.

14. A comparison of Student's 2014 standardized tests scores with her 2011 scores demonstrated her academic gains. The Woodcock Johnson and Wide Range tests are age-normed. Similar scores over time showed that Student was maintaining her skill level in comparison to her peers. Therefore, Student's similar math and reading fluency test scores in

2011 and 2014, showed academic growth, as the test scores reflect growing skill sets over the years. Further, Student's scores increased on seven of the subtests, with her most dramatic improvement in passage comprehension (increase from a 2011 standard score of 60 to a 2014 score of 84) and writing fluency (increase from a 2011 score of 73, to a score of 84). Student's lower scores on three math tests and one reading test did not establish that she failed to receive educational benefit. Student's steepest drop was in math calculations on the Woodcock Johnson, where her score of 75 in 2011, dropped to a score of 48 in 2014. This score was not a reliable indicator of her functioning when compared to her other 2014 math test scores and her class performance.

15. Student did not persuasively refute evidence of her academic gains and progress on goals. She received meaningful educational benefit and did not meet her burden of proving that Oakland failed to provide her with an appropriate educational placement and supports for her academic needs. Student was not denied a FAPE in this regard.

### *Incidents of Bullying*

16. Under the California Education Code, bullying is defined as "any severe or pervasive physical or verbal act or conduct by a pupil or group of pupils ... directed toward one or more pupils" that causes or is "reasonably predicted" to cause a reasonable student to experience one or more of the following:

- (a) fear of harm to her person or property;
- (b) a substantially detrimental effect on her physical or mental health;
- (c) a substantial interference with her academic performance; or
- (d) a substantial interference with her ability to participate in or benefit from the services, activities, or privileges provided by a school.

(Ed. Code, § 48900, subd. (r).)

17. In a 2013 joint letter, the Office of Special Education and Rehabilitative Services and the Office of Special Education Programs described bullying as, "characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time."<sup>25</sup> (*Dear Colleague Letter*, 61 IDELR 263 (OSERS 2013).) This letter explained that bullying includes, "overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert

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<sup>25</sup> These offices are a division of the United States Department of Education and are charged with administrating the IDEA and developing its regulations.

behaviors.” (*Ibid.*) Although this letter provides guidance as to how a district should respond to bullying, it acknowledges that bullying results in a denial of FAPE, only when it prevents the targeted student from receiving meaningful educational benefit.

*Issues 1(b), 3(b), and 6(b): Bullying, Safe Environment, and the Provision of FAPE*

18. The incidents of classmates teasing Student and calling her names relating to a perceived odor, constituted a pattern of behavior that meets the criteria for bullying. Student was subjected to acts of bullying during the statutory period from January 2013, through September 2014. Under the Education Code, bullying is severe or pervasive conduct. The name calling and teasing Student faced meets the definition of severe and constitutes an act of aggression by its intensely personal nature. It was pervasive in that it happened at least a couple times each month across her sixth and seventh grade years. There was no evidence that the bullying caused Student any harm or adversely impacted her education. However, it was “reasonably predictable” that such conduct would cause a reasonable student to suffer a substantially detrimental impact on her mental health, and substantially interfere with her academics and school activities.

19. The persistent and personal acts of teasing and name-calling did not involve the type of peer-on-peer name calling that the United States Supreme Court has found inevitable in the adolescent school environment:

“Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults... . Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children.”

(*Davis v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 651-652 [119 S.Ct. 1661, 143 L.Ed.2d 839] (*Davis*).) Oakland itself, in banning the use of certain words in class which related to names that Student had been called, recognized that Student was being bullied, not simply teased.

20. Oakland contended that the sexual incident in September 2014, was consensual and did not constitute bullying. While Oakland did not believe Student’s accounting of events, it failed to introduce admissible evidence refuting her statements. Two male students exposed themselves to Student in the special day classroom and asked her to perform a sexual act. This happened more than one time, since the start of the 2014-2015 school year. The involved male students threatened to spread rumors about Student if she refused or reported. These acts of sexual harassment constitute severe and pervasive conduct likely to cause Student to fear harm and to suffer mentally, and to cause substantial interference with her academics and school activities. Further, under the OSERS definition,

these acts were aggressive with the bullies threatening Student's reputation. Because of the involvement of two males, the sexual nature of the harassment, the repetition of the requests, and the location within the school setting, the acts involved a perceived power imbalance. These acts also constitute bullying and threatened Student's social, emotional, and mental wellbeing.

21. In *M.L. v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634 (*M.L.*), the Ninth Circuit addressed whether a student who was subject to teasing was denied a FAPE. In *M.L.*, the court noted that neither the IDEA nor any court had directly addressed the question of whether unaddressed teasing could constitute a denial of FAPE. (*Id.* at 650.) The Ninth Circuit referenced the case of *Charlie F. v. Bd. of Educ.* (7th Cir. 1996) 98 F.3d 989, 993 for the proposition that, “ ‘at least in principle relief is available under the IDEA’ when a teacher invited her pupils to express their complaints about a disabled student which led to humiliation, fistfights, mistrust, loss of confidence and self-esteem, and disruption of his educational progress.” (*M.L.*, supra 394 F.3d 650.)

22. In *M.L.*, parents' action of removing the student from school after only five days did not allow the district a reasonable opportunity to prevent or address the teasing. Further, the parents failed to demonstrate that the teasing affected the student, interfered with his education, or resulted in the loss of an educational benefit. The Ninth Circuit articulated a rather stringent test, “If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE.” (*M.L.*, supra, 394 F.3d 634, 650-651 citing *Davis*, supra, 526 U.S. 629, 633 [holding that to violate Title IX “harassment ... [must be] so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.”].)

23. Oakland investigated the acts of bullying against Student. With regards to the name-calling, Oakland disciplined the bullies, sent them to the office, and moved Student to the younger class section to prevent the older students from bullying her. Oakland convened group conferences and restorative justice circles in an attempt to process and to prevent further bullying. After learning of the sexual incident, Oakland conducted an investigation, involved the police, held a parent-student meeting, changed Student's classes to limit her contact with the two involved males, and transferred her to a new school upon Parent's request.

24. Student bore the burden of proving that the acts of bullying deprived her of a FAPE. She did not meet her burden. Student was a good, attentive student, a leader, and a self-starter who made academic gains. She did not demonstrate any maladaptive behaviors or display any social-emotional concerns. There was some evidence that Student complained to Parent about the bullying, and that Parent sometimes allowed her to stay home due to bullying. Student did not establish the frequency of such bullying-related absences. Further, she frequently missed school dating back to fourth grade and continuing through eighth grade at Roosevelt, where she was not subjected to bullying. During seventh grade, Student

frequently missed school on Fridays. The bullying did not cause any adverse educational impact. Student displayed normal interactions with her classmates, and continued to make academic progress.

25. As explained by the United States Department of Education,

[s]tudents who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feelings of alienation from school, poor relationships with peers, loneliness, or depression .... [t]he consequences may result in students changing their patterns of school participation.

(*Dear Colleague Letter*, 61 IDELR 263 (OSERS 2013).) Student did not establish any such adverse consequences. (See *T.K. v. New York City Dept. of Educ.* (E.D.N.Y., 2014) 32 F.Supp.3d 405, 419 [evidence supporting a denial of FAPE due to bullying included: emotional withdrawal, developmental regression, subdued demeanor, appearing less happy, non-interactive and shut-down, and weight gain].) As upsetting as the reports of bullying are, Student was required to prove an adverse impact on her education. Student did not establish the bullying resulted in a denial of FAPE.

#### *IEP Team Composition*

26. Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each student with exceptional needs. (20 U.S.C. § 1414 (d)(4)(A); Ed. Code, §§ 56340, 56341, subd. (a).) An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; other individuals at the discretion of the parties; and when appropriate, the student with exceptional needs. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b).)

#### *Issue 2: Required Attendees at the November 2013 IEP Meeting*

28. Student contends that Oakland committed a procedural violation that resulted in substantive harm when it failed to have her special education teacher attend the November 2013 annual IEP team meeting. Oakland contends that Student's special education teacher did attend the November 2013 IEP team meeting.

29. Mr. Wright was one of Student's special education teachers during the 2013-2014 school year. He not only attended the November 2013 IEP team meeting, he chaired it. There is no legal requirement that prohibits the same individual from serving as both the

chairperson and as the special education specialist at an IEP team meeting. The November 2013 IEP team meeting was properly constituted.

#### *Assessments and Suspected Areas of Disability*

30. In order to meet the continuing duty to develop and maintain an appropriate educational program, the school district must assess the educational needs of the disabled child. (20 U.S.C. § 1414(a), (b); Ed. Code, § 56320.) Educational need is broadly construed and includes social and emotional needs. (*Seattle, supra*, 82 F.3d 1493, 1500.) For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); See 34 C.F.R. § 300.304(c)(4) and Ed. Code, § 56320, subd. (f) [child must be assessed in all areas related to the suspected disability].) In California, the term “assessment” has the same meaning as the term “evaluation” in the IDEA. (Ed. Code, § 56302.5).

31. A reassessment shall be conducted if the district determines that the educational or related services needs including functional performance of the student warrant a reassessment or if the parent or teacher requests reassessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the district agree otherwise, and shall occur at least once every three years, unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A district’s failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1032-1033 (*Park*); *Orange Unified School Dist. v. C.K.* (C.D.Cal., June 4, 2012, No. SACV 11–1253 JVS (MLGx)) 2012 WL 2478389, p.8.)

#### ANALYSIS OF PROCEDURAL VIOLATIONS

32. There are two parts to the legal analysis of whether a school district offered a student a FAPE: whether the educational agency has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate, meaning it was “reasonably calculated to enable the child to receive educational benefits.” (*Rowley, supra*, 458 U.S. at pp. 206-207.) Procedural flaws do not automatically result in a denial of a FAPE. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

33. A procedural violation of the IDEA results in a denial of a FAPE only if the violation: (1) impeded the student’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2) & (j); *Target Range, supra*, 960 F.2d at p. 1484.)

*Issue 4(a) and 4(b): Assessing Student's Social-Emotional and Mental Health Needs*

34. Student contends that as a result of the ongoing bullying, including the sexual incident and harassment in September of 2014, Oakland had reason to suspect that she may have social-emotional and mental health needs. Student asserts Oakland was required to assess her in these two areas. Oakland contends that it had no reason to suspect Student had any needs other than academic needs. Because Parent, teachers, Student, and her general education counselor did not report any social-emotional or mental health needs, and Student did not present with any such needs, Oakland argues it was not obligated to conduct additional assessments.

35. Although Student's classroom functioning did not reveal any social-emotional or mental health concerns, she was due for a triennial re-assessment in November 2014. Mr. Dalebout's determination that additional testing was not required for him to render a professional opinion as to Student's social-emotional functioning was not persuasive given the information he did not know and, therefore, did not take into account. For instance, Mr. Dalebout did not know that Student was subjected to bullying in the form of sexual harassment at Frick, or that Parent requested counseling services in September 2014. Further he did not know that Student was subjected to bullying during her sixth and seventh grade years. In addition, Mr. Dalebout did not take into consideration Student's attendance records. Student missed a couple weeks of school during both sixth and seventh grade. From October 2014 through the date of his report on November 12, 2014, Student accrued four unexcused full day absences, was tardy to class four times, and missed four additional class periods. Oakland had a duty to look beyond Student's current functioning, and consider the possible impact of pervasive bullying, given Student's social-emotional deficits identified in 2011.

36. As part of her 2011 triennial assessment, Oakland assessed Student's social-emotional functioning. Student required supports in her coping and problem solving skills due to an inadequate capacity for emotional and social functioning, and a reduced ability to cope with daily demands. At the time of her 2011 triennial IEP team meeting, Student was subjected to bullying and other students avoided her. By November 2012, Student was struggling with self-esteem issues. The IEP team agreed that for her 2012-2013 sixth grade year, Student required a special day class due to social, emotional, or behavioral needs concurrent with her learning needs. Throughout sixth and seventh grade, Student was subjected to ongoing bullying in the form of teasing and name calling related to a perceived body odor. During the 2012-2013 school year, Oakland referred Student to mental health services, albeit a general education intervention, in response to this ongoing bullying. By the November 2013 annual IEP team meeting, Student's ability to handle her emotions had improved, but she was still being bullied on a regular basis, and the team noted that Student struggled with being picked on. Oakland transferred Student back to the younger sixth/seventh class section for social-emotional reasons, where she remained even after the start of her eighth grade year. At the end of her 2013-2014 school year, she was involved in

one physical altercation, and in September 2014 she was involved in one verbal and one physical altercation, resulting in suspension. That same month Student disclosed that she had been sexually harassed in the classroom, and she transferred to a new school. Based on the totality of the circumstances described above, by September 2014, Oakland had reason to suspect that Student may have social-emotional and mental health needs. Oakland had a duty to assess Student in these areas.

37. Student demonstrated great resiliency. She presented at school as happy, engaged, and communicative, a leader, socially adept, and an attentive and progressing learner. Nevertheless, she experienced relentless bullying across two school years and was sexually harassed in the classroom by two male peers on more than one occasion. It is reasonable to suspect that such events could result in social, emotional, or mental health needs.

38. Oakland's failure to assess Student's social-emotional functioning and mental health constitute procedural violations. The second inquiry upon the establishment of a procedural violation is whether the violations resulted in a denial of a FAPE to Student by either significantly impeding Parent's right to meaningfully participate in the IEP process, or denying Student's right to a FAPE, or resulting in a deprivation of educational benefit. Oakland's failure to assess Student in the areas of social-emotional functioning and mental health deprived the IEP team, including Parent, of full assessment data, which denied Parent meaningful participation in the 2014 triennial IEP team meeting, and also deprived her of her right to disagree with Oakland's assessments and request independent evaluations.

39. The United States Department of Education attaches great importance on accurate, comprehensive evaluations as underscored by its regulation providing that parents who disagree with school districts' evaluations may obtain an independent evaluation at public expense. (34 C.F.R. § 300.502(b).) Student met her burden of proving that Oakland's failure to conduct a social-emotional and mental health assessment resulted in a substantive denial of FAPE.

#### *Triennial Assessments*

40. A triennial assessment serves two separate but related purposes. First, it examines whether a student remains eligible for special education; second, it determines the student's unique needs which, in turn, could trigger a revision of the IEP. (20 U.S.C. §1414(c)(1)(B); Ed. Code, §56381, subd. (b)(2).) The triennial consists of a review of existing information and may include additional assessments. (20 U.S.C. § 1414(c)(1); 34 C.F.R § 300.305 (a); Ed. Code, § 56381(b).) Based upon a review of existing information and with input from the student's parents, the IEP team shall identify what additional data, if any, is needed to determine: (i) whether the student continues to have a disability and related educational needs; (ii) the present levels of academic achievement and related developmental needs of the student; (iii) whether the student continues to need special education and related

services; and (iv) whether any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum. (20 U.S.C. § 1414 (c)(1)(B); 34 C.F.R. § 300.305(a)(2); Ed. Code, § 56381, subd. (b)(2).)

41. If the IEP team determines that no additional data is needed to determine whether the student continues to be eligible for special education and related services, the local educational agency shall notify the student's parents of that determination, the reasons for the determination, and the right of the parents to request an assessment to determine whether the student continues to have a qualifying disability and to determine the student's educational needs. (20 U.S.C. § 1414(c)(4)(A); 34 C.F.R. § 300.305 (d)(1); Ed. Code, § 56381, subd. (d).)

#### CONSENT AND TIMELINES FOR ASSESSMENTS

42. Assessments require parental consent. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(i); Ed. Code, § 56381, subd. (f)(1).) Consent means that the parent has been fully informed of all relevant information regarding the proposed action; the parent understands and agrees in writing to the proposed action; and the parent understands that the granting of consent is voluntary and may be revoked, although any revocation is not retroactive. (34 C.F.R. § 300.9; Ed. Code, § 56021.1.) To obtain parental consent for a reassessment, the school district must provide proper notice. (20 U.S.C. §§1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56329.) The notice consists of the proposed written assessment plan and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C § 1414(b)(1); Ed. Code, §§ 56321, subd. (a).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five schooldays and other specified days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

#### *Issue 4(c): Oakland's Duty to Conduct Psychological Testing*

43. Student contends that Oakland was required to complete a full psycho-educational assessment with testing in the areas of cognition, perception, and social-emotional well-being, as part of her triennial assessment in the fall of 2014.<sup>26</sup> Oakland contends that it provided Parent the triennial re-evaluation determination form which reflected an agreement that psychological testing was not required, and that in signing this form, Parent waived a full triennial reassessment, and agreed to limited testing. Oakland argues it was only required to assess Student's academic achievement, health, and motor development.

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<sup>26</sup> In support of this contention, Student argues in her closing brief that the 2011 triennial assessment was flawed. However, Student did not identify as an issue for hearing whether the 2011 assessment, which predates the statute of limitations, met all legal requirements.

44. On October 13, 2014, Parent signed Oakland's triennial re-evaluation determination form and a separate assessment plan. The signed assessment plan required Oakland to conduct psychological testing in the area of intellectual development in addition to health, academics, and motor skills. Parent's signing of the re-evaluation determination form did not constitute a waiver of testing. Rather, Parent checked the box that she was exercising her right to request testing. Further, this form did not void the signed assessment plan which required cognitive testing. Oakland did not explain to Parent the purpose of a triennial assessment, whether it was recommending psychological testing, and why it proposed limited testing. It did not explain to Parent her right to disagree and request a full battery of tests. Oakland simply sent home two contradictory forms.

45. Parent did not provide informed consent to waive the triennial assessment. Oakland was required to assess Student in the area of social-emotional functioning as determined above. Further, Oakland was required to complete psychological testing in the area of intellectual development as provided for in its assessment plan signed by Parent on October 13, 2014.

46. Oakland's failure to complete cognitive testing resulted in a procedural violation. This violation impeded Parent's ability to meaningfully participate in the decision-making process as she was deprived of full assessment data that Oakland agreed to obtain, per its own assessment plan. This resulted in a substantive denial of FAPE.

#### *The IEP Team Involvement in Educational Placement Decisions*

47. A parent must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to her child. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.501(b); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (34 C.F.R. § 300.116 (a)(1); Ed. Code, § 56342.5.) "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904]. Protection of parental participation is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J.*, *supra*, 267 F.3d 877, 882.)

#### DEFINITION OF EDUCATIONAL PLACEMENT

48. In California, "a specific educational placement means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the student's IEP, in any one or a combination of public, private, home and hospital, or residential settings." (Cal. Code Regs., tit.5, § 3042.) "The definition of educational placement is not an exact one, rather it is a combination of different factors listed in the disjunctive." (*Termine v. William S. Hart Union High School Dist.* (C.D.Cal. 2002) 219 F.Supp.2d 1049, 1058.)

## REQUIREMENT OF A FORMAL WRITTEN OFFER OF PLACEMENT

49. A parent's procedural right to participate in the IEP process includes the right to receive from the district a formal written offer that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) In a recent unpublished case, the federal district court for the central district of California highlighted the requirement of a specific offer of placement. (*Bookout v. Bellflower Unified School Dist.*, (C.D. Cal., March 21, 2014, No. CV 13-2710-SH) 2014 WL 1152948, p.10 [failure to offer a specific special day classroom placement significantly restricted parent participation].) However, the right to a specific written placement offer does not mean that a change in the location of a program necessarily results in a change in educational placement.

## CHANGE IN LOCATION V. CHANGE IN PLACEMENT

50. In addressing the difference between "placement" and "location", the United States Department of Education stated, "Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services." (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Regs. 46588 (August 14, 2006).) "The Department's longstanding position is that placement refers to the provision of special education and related services rather than to a specific place, such as a specific classroom or specific school." (71 Fed.Reg. 46687 (August 14, 2006).); see also *Johnson v. Special Educ. Hearing Office* (9th Cir. 2002) 287 F.3d 1176, 1182.) The Department further explained, "maintaining a child's placement in an educational program that is substantially and materially similar to the former placement is not a change in placement. We do not believe further clarification is necessary in the regulations, however, as the distinction seems to be commonly accepted and understood." (71 Fed. Regs. 46588-89 (August 14, 2006).)

51. A change in location alone will not constitute a change in educational placement unless it substantially and materially alters the student's educational program. (*Letter to Fisher*, 21 IDELR 992 (OSEP 1994).) The following factors are relevant in determining the effect of a change of location: whether the educational program set out in the student's IEP has been revised; whether the student will be able to be educated with nondisabled children to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements. (*Ibid.*)

52. In *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047 (*Anchorage*), the Ninth Circuit reiterated its 2010 definition of educational placement first articulated in *N.D. v. Hawaii Department of Educ.* (9th Cir. 2010) 600 F.3d 1104, 1116 (*N.D.*). (*Anchorage, supra*, 689 F.3d 1047, 1056-57 [no change in educational placement where an update of present levels and goals did not significantly change the program and where the

educational setting required by a stay put order was maintained].) The Ninth Circuit has defined “educational placement” to be “the general educational program of the student.” (*N.D., supra*, 600 F.3d at 1116 [finding furloughs and school closures did not result in a change in educational placement].) More specifically, the Ninth Circuit concluded, “under the IDEA a change in educational placement relates to whether the student is moved from one type of program - i.e., regular class - to another type - i.e., home instruction. A change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting.” (*Ibid.*)

53. Several other Circuit Courts have reached the same conclusion. A change in location of services does not constitute a change in educational placement where the “new setting replicates the educational program contemplated by the student's original assignment.” (*A.W. v. Fairfax County School Bd.*, (4th Cir. 2004) 372 F.3d 674, 682.) The Fifth Circuit held, “‘Educational placement,’ as used in the IDEA, means educational program - not the particular institution where that program is implemented.” (*White v. Ascension Parish School Bd.*, (5th Cir. 2003) 343 F.3d 373, 379.) The Second Circuit explained “educational placement” as follows, “the classes, individualized attention and additional services a child will receive - rather than the ‘bricks and mortar’ of the specific school.” (*T.Y. v. N.Y.C. Dept. of Educ.* (2d Cir. 2009) 584 F.3d 412, 419.).

54. A change in location proposed by a district may constitute a change in placement if the change in location will substantially alter the student's educational program or violate the mandate for a least restrictive environment. (71 Fed. Reg. 46588-465589 (August 14, 2006); *Letter to Earnest*, 211 IDELR 417 (OSERS 1986).) Further, a particular location may be so intrinsically related to an IEP that moving the student to another location constitutes a change in placement. (*Hill v. School Bd. for Pinellas County* (M.D. Fla. 1997) 954 F.Supp. 251, 253 [in dicta, court acknowledged “the prospect of circumstances under which attributes of an institution, a location, a teacher-student relationship, or the like, might become so pronounced and valuable to the student and his or her IEP, that a change in school is tantamount to a change in the IEP.”] *affd.* (11th Cir. 1998) 137 F.3d 1355.) The location of the educational services may be a factor in determining whether a “fundamental change” in educational placement has occurred. (*Eley v. District of Columbia* (D.D.C.2014) 47 F.Supp.3d 1, 14, fn. 11 (*Eley*). In analyzing a stay put placement, the *Eley* court adopted a definition proposed by the Seventh Circuit, “the meaning of ‘educational placement’ falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP.” (*Eley, supra*, 47 F. Supp.3d at 14, citing *Board of Educ. of Community High School Dist. No. 218 v. Illinois State Board of Educ.* (7th Cir.1996) 103 F.3d 545, 548, (*Cook County*).) The *Cook County* Court observed that, since “the term ‘educational placement’ is not statutorily defined ... identifying a change in this placement is something of an inexact science.” (*Cook County, supra*, 103 F.3d at 548.)

*Issue 5(a): Student's Transfer to Roosevelt*

55. Student identified as an issue for hearing that her transfer from Frick to Roosevelt constituted a change in educational placement that triggered the convening of an IEP team meeting, prior written notice, and Parent's consent. Oakland contends that Parent, in requesting the change in schools, consented to the transfer. Oakland further asserts that this requested transfer resulted in a change in location only, such that it was not required to convene an IEP team meeting or provide prior written notice.

PARENT CONSENTED TO THE SCHOOL CHANGE

56. Parent not only consented to the change in school, she requested it. Oakland agreed to Parent's request to transfer Student and located an opening at Roosevelt. Parent accepted this transfer and brought Student to her new school starting October 1, 2014. On November 19, 2014, Parent signed consent to the triennial IEP which identified Student's school of attendance as Roosevelt.

CHANGE IN LOCATION ONLY

57. The cases discussed above, all stand for the proposition that a determination of whether a change in physical location constitutes a change in educational placement requires a fact specific inquiry. The California regulation which lists location as one possible component of an educational placement, does not eliminate the inquiry as to whether a change in location constitutes a substantial or material change in program. Pursuant to the Ninth Circuit's definition of educational placement, Student's educational placement was a special day class. Student did not establish that her educational placement consisted of any unique factors associated with the special day class at Frick, such as personnel, location, class constitution, or programming, including mainstreaming.

58. Oakland changed Student's school location at Parent's request. Oakland determined that the Roosevelt special day class could implement Student's existing IEP. Student did not demonstrate any change to her program, other than the change in location. At Roosevelt, Student continued to attend a special day class for students with mild to moderate disabilities for all her core academic classes, with certified teachers and support staff. Although there was no evidence as to the staffing ratio at Roosevelt, or the profile of the students served at the respective locations, Student bore the burden of proof, and she failed to establish a substantial or material change in program. At Roosevelt, Student was afforded the same opportunity to be educated with her typical peers by attending one elective and one P.E. class in the general education setting. The addition of one special education class period per day at Roosevelt did not result in any substantial change in program. Under the facts of this case, Student's transfer to another school at Parent's request did not result in a change in educational placement. Accordingly, Oakland did not have a duty to convene an IEP team meeting or provide prior written notice of the change in schools.

### *Prior Written Notice*

59. A school district must provide written notice to the parents of a student with exceptional needs whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: 1) a description of the action proposed or refused by the agency; 2) an explanation for the action or refusal, along with a description of each assessment or report the agency used as a basis for the action or refusal; 3) a statement that the parents are entitled to procedural safeguards and how they can obtain a copy; 4) sources of assistance for parents to contact; 5) a description of other options that the IEP team considered, with the reasons those options were rejected; and 6) a description of the factors relevant to the agency's action or refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b).) A district's failure to provide adequate prior written notice is a procedural violation of the IDEA.

60. The prior written notice requirements are only applicable to a change in educational placement, not a change in location. (*Letter to Fisher*, 21 IDELR 992 (OSEP 1994).) Notice must be provided even if parents themselves suggested the change or agreed to it. The educational agency must comply with the prior written notice requirements regardless of the source of the proposed change, or the parents' stance toward the proposal. (*Letter to Lieberman*, 52 IDELR 18 (OSEP 2008).)

61. An IEP document can serve as prior written notice as long as the IEP contains the required content of appropriate notice. (71 Fed.Reg. 46691 (August 14, 2006).) The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a violation of such procedures does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

### *Transportation Services*

62. The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) transportation in and around school buildings; and (iii) specialized equipment (such as adapted buses, lifts, and ramps), if required to provide transportation for a student with a disability. (34 C.F.R. § 300.34(c)(16).) The IDEA does not explicitly define transportation as door-to-door services. Decisions regarding such services are left to the discretion of the IEP team. (71 Fed. Reg. 46576 (August 14, 2006).)

63. Taking into consideration local transportation policies, a district must provide transportation or other related services only if a student with a disability requires it to benefit from her special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, §§ 56342, subd. (a) & 56363, subd. (a).) The IDEA requires transportation of a special

education student only to address her educational needs, not to accommodate a parent's convenience or preference. (*Fick v. Sioux Falls School Dist.* 49-5 (8th Cir. 2003) 337 F.3d 968, 970 [district may apply a facially neutral transportation policy to a special education student when the request to deviate from the policy is based on parent's convenience not student's needs].)

64. Although the Ninth Circuit has not specified criteria for determining whether a student needs transportation as a related service, the Eleventh Circuit identified the following relevant factors in analyzing a need for transportation, including: (1) the student's age; (2) the distance of travel; (3) the nature of the area through which the student must pass; (4) the student's access to private assistance in making the trip; and (5) the availability of other forms of public assistance in route, such as crossing guards or public transit. (*Donald B. v. Board of School Commissioners of Mobile County, Ala.* (11th Cir. 1997) 117 F.3d 1371, 1375.)

#### *Issue 5(b): Denial of Transportation as a Related Service*

65. Student contends that she was entitled to transportation to Roosevelt because it was located at a greater distance from her home than her prior school. Student asserts that once Parent requested transportation, Oakland was required to send her prior written notice of its refusal to offer this service. Oakland contends that Student was not entitled to transportation as an IEP service so that any violation in failing to provide prior written notice was harmless.

66. Since her initial eligibility for special education services, Student has never qualified for transportation as a related service. Parent has always transported Student to and from school. Parent requested that Student be transferred from Frick due to safety concerns. Once Oakland offered to transfer Student to Roosevelt, Mr. Taylor promised Parent that Student would receive bus transportation and sent her a letter telling her how to add Student to the bus schedule. Oakland subsequently determined that Student was not eligible for transportation. At that point, Oakland was required to provide Parent with prior written notice that it was denying her transportation request and the reasons why Student would not be transported to Roosevelt. Its failure to do so constitutes a procedural violation. Even so, Oakland's agreement to transfer Student another school, and its promise to arrange transportation to Roosevelt, did not mean that Student required transportation to receive a FAPE. Student did not introduce any evidence that she required transportation in order to receive educational benefit. Therefore, failure to provide prior written notice did not result in a denial of FAPE.

#### *Counseling Services*

67. Related services may include counseling and guidance services, and psychological services other than assessment. (Ed. Code § 56363, subd. (b)(9) and (10).) An educational agency satisfies the FAPE standard by providing adequate related services

such that the child can take advantage of educational opportunities and achieve the goals of his IEP. (*Park, supra*, 464 F.3d 1025, 1033.)

*Issue 5(c): Denial of Counseling as a Related Service*

68. Student contends that Oakland's failure to provide prior written notice of its refusal to provide counseling services, upon Parent's request after the September 2014 sexual incident, was a procedural violation that denied her a FAPE. Oakland contends that any failure to provide prior written notice did not result in a denial of FAPE because Student did not require counseling services to access her educational program.

69. Parent requested counseling services for Student in September 2014, following incidents of sexual harassment at Frick. In response, Oakland provided Student a COST referral for mental health services available to all students. Oakland did not provide Parent with prior written notice of its refusal to provide Student counseling services as part of her IEP and its reasons for denying her request. Therefore, Oakland committed a procedural violation. Student did not demonstrate that she had mental health needs such that she required the related service of counseling in order to receive educational benefit. Student did not exhibit any mental health symptoms that adversely impacted her education. That Student may have benefited from counseling did not establish an educational need. Although Oakland had sufficient information to suspect that Student might have mental health needs which warranted an assessment, Student did not establish that she had mental health needs which entitled her to services. Oakland's failure to provide prior written notice of its refusal to offer counseling services did not result in substantive harm.

## REMEDIES

1. Student prevailed as to Issues 4(a), (b), and (c). As a remedy, Student requests an independent psycho-educational evaluation which includes social-emotional testing, and an independent mental health evaluation funded by Oakland.

2. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of Burlington v. Department of Educ.* (1985) 471 U.S. 359 at pp. 370, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d 1489, 1497.)

3. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Id.* at 1497.) An award to compensate for past violations must rely on an

individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) An independent educational evaluation at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

4. The independent educational evaluation is not just an additional tool for determining a student's needs; it is designed to give parents essential information to use in the IEP process. The Supreme Court has stressed the importance of an independent evaluation in redressing the relative advantages a school district has in expertise and in its superior control of information about a student:

School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them . . . [Parents] have the right to an independent educational evaluation of the[ir] child . . . IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

(*Schaffer v. Weast*, *supra*, 546 U.S. at pp. 60-61 [citations and internal quotation marks omitted].)

5. The Eleventh Circuit, in rejecting an attack on the regulation allowing for an independent evaluation to be conducted at public expense, observed that “[t]he right to a publicly financed [independent evaluation] guarantees meaningful participation throughout the development of the IEP.” (*Phillip C. v. Jefferson County Bd. of Educ.* (11th Cir. 2012) 701 F.3d 691, 698 (*Phillip C.*), cert. denied *Jefferson County Bd. of Educ. V. Phillip C.* (2013) 134 S.Ct. 64. The Eleventh Circuit cited *Honig v. Doe* (1988) 484 U.S. 305, 311, as follows, “Congress repeatedly emphasized throughout the Act the importance and indeed necessity of parental participation in both the development of the IEP and any subsequent assessment of its effectiveness.” (*Phillip C.*, *supra*, 701 F.3d 698.)

6. Student is entitled to an independent psycho-educational evaluation that includes intellectual development, cognition, and social-emotional testing. Student is also entitled to a separate independent mental health evaluation. Parent shall choose the evaluators in accord with Oakland's independent educational evaluation criteria. Oakland shall fund the presence of both assessors at an IEP team meeting to discuss the results.

## ORDER

1. Within 60 days of this Decision, Student shall provide Oakland with the names of qualified assessors to conduct an independent psycho-educational evaluation with testing in the areas of intellectual development, cognition, and social-emotional functioning, as well as an independent mental health evaluation. Within 45 days of Student's identification of qualified and available assessors, Oakland shall contract with and directly pay these assessors for the independent assessments. Oakland shall not be required to pay for travel costs in excess of 150 miles from Oakland, if the chosen assessors are located outside of that geographic area.

2. Oakland shall fund the presence of the independent assessors at an IEP team meeting to review the results of the independent assessments. This IEP team meeting(s) shall be convened within 30 days of receipt of the independent assessments, not including days of summer vacation.

3. Student's other requests for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed as to Issues 4(a), (b) and (c). Oakland prevailed as to all other issues heard and decided.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: June 4, 2015

/s/

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THERESA RAVANDI  
Administrative Law Judge  
Office of Administrative Hearings